90-860

Supreme Court, U.S.
FILED
NOV 2 1990
JOSEPH F. SPANIOL, JR.
CLERK

No.

In The

Supreme Court of the United States

October Term, 1990

ELIZABETH AIELLO,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

LARRY BRONSON
Attorney for Petitioner
654 Avenue C
Bayonne, New Jersey 07002
(201) 858-8338

QUESTION PRESENTED

1. Whether 21 U.S.C. § 881 and this Court's opinion in Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) abrogate the rule that a court may not resolve disputes of facts or issues of credibility on a motion for summary judgment and authorize a court to assess and weigh evidence submitted by the party opposing the motion?

LIST OF PARTIES

The parties to the proceedings below were the United States of America; Elizabeth Aiello; Anthonino Aiello; All Monies and Other Property Contained in Any and All Accounts and Certificates in the name of Antonio Aiello, and/or Vito Aiello, and/or Elizabeth Aiello, and/or Antonette Aiello, and/or Rose Aiello, and/or Vito Aiello, (SON), and/or including but not limited to Checking Accounts No. 857073940 and 858570318439 and Savings Accounts No. 3886735, 7-8-19709, 1-250-421, 1-206-982, 1-250-783, 11-4711, 7-8-19710, 1-4710 and 7-716305, maintained at various branches of Hamburg Savings Bank; All Monies and Other Property Contained in any and all Accounts and Certificates in the name of Vito Aiello, and/or Antonio Aiello, including but not limited to Savings

Accounts No. 715365 and 97675 and Certificate No. 910-101-17, maintained at various branches of Maspeth Federal Savings; All Monies and other Property Contained in any and all Accounts and Certificates in the name of Betty 'N' Jenny's Pizza and/or Anthony Aiello, and/or Elizabeth Aiello, and/or Jane Gambina and/or including but not limited to Checking Account No. 21243-04604, maintained at various branches of National Westminster Bank; All Monies and other Property contained in any and all Accounts and Certificates in the name of Gambi Realty, Inc.. and/or Anthony Aiello, and/or Elizabeth Aiello, including but not limited to Checking Account No. 005005464-92, maintained at various branches of Manufacturers Hanover Trust Co; the Premises known as 66-20 Fresh Pond Road, Queens, New York; the Premises known as 69-04 59th Avenue, Queens, New York; the Premises

known as 75-21 Caldwell Avenue, Queens, New York; and Real Property known as 78-84 West 125th Street and 290-296 Lenox Avenue, New York, New York, described as block 1722, Lot 69, Sec. 6 in the Records of the Clerk of New York County and Real Property in Coxsackie, New York described in a deed recorded in the Greene County Clerk's office at Liber 514, Page 842, and more fully described herein, and Real Property on the northeast corner of 125th Street and St. Nicholas Avenue, New York, New York described as block 1952, Lot 19 in the Record of the Clerk of New York County and Real Property in New Baltimore, New York described in a deed recorded in the Greene County Clerk's office at Liber 506, page 305 and more fully described herein and All Monies in Account # 51-30-2925 in the name of Gambi Realty, Inc., maintained at Long Island Trust Company

and All Monies in Accounts in the name of AA Farms, Inc., maintained at National Bank of Coxsackie and Assorted Jewelry Valued at $375,805.00.

The parties before this Court on the instant petition are the United States of America, Elizabeth Aiello, and the various properties, bank accounts and jewelry.

TABLE OF CONTENTS

QUESTION PRESENTED i

LIST OF PARTIES ii

TABLE OF CONTENTS vi

TABLE OF AUTHORITIES vii

OPINIONS BELOW 1

JURISDICTION 2

STATUTES INVOLVED 4

STATEMENT OF THE CASE 7

REASON FOR GRANTING THE WRIT:

I. This Court's opinion in Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and the procedural peculiarities associated with 21 U.S.C. § 881 have led lower courts to ignore well settled prohibitions against resolving disputes of fact and issues of credibility on a motion for summary judgment to transform Fed. R. Civ. P. 56 into an instrument of summary justice 31

CONCLUSION 51

APPENDIX A-1

Opinion of the Court of Appeals A-1

Opinion of the District Court A-9

TABLE OF AUTHORITIES

Cases:

Amman v. Home Inv. Co., 243 F.2d 748 (9th Cir. 1945) 41

Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986) 31, 43, 45, 46, 49

Auto Drive-Away Company of Hialeah Inc. v. I.C.C., 360 F.2d 446 (5th Cir. 1966) 41

Celotex Corp. v. Catrett, 477 U.S. 317 (1986) 47, 48

Equia v. Tompkins, 756 F.2d 1130 (5th Cir. 1985) 41

First National Bank of Arizona v. Cities Service Co., 391 U.S. 253 (1968) 33

Krieger v. Ownership Corp., 270 F.2d 265 (3rd Cir. 1955) 32

One Blue 1977 AMC Jeep CJ-5 v. United States, 783 F.2d 759 (8th Cir. 1986) 43

Perma Research & Development Co., 410 F.2d 572 (2d Cir. 1969) 32

Pollack v. City of Newark, New Jersey, 147 F.Supp. 35, (D. N.J. 1956), aff'd 248 F.2d 543 (3rd Cir. 1957) cert. denied, 355 U.S. 964 (1958) 42

Poller v. Columbia Broadcasting Systems, Inc., 368 U.S. 464 (1962) 32

Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620 (1944) 32

Townsend v. Columbia Operations, 667 F.2d 844 (9th Cir. 1982) 41

United States v. One Motor Yacht Named Tahuna, 702 F.2d 1276 (9th Cir. 1983) 43

United States v. One Single Family Residence with Outbuildings Located at 15621 S.W. 209th Avenue, Miami, Florida, 699 F.Supp. 1531 (S.D. Fla. 1988) 37

United States v. Premises Known as 2639 Meetinghouse, 633 F.Supp. 979 (E.D. Pa. 1986) 34, 35

United States v. Premises Known as 171-02 Liberty Avenue, 710 F.Supp. 46 (E.D.N.Y. 1989) 37

United States v. Property Located at 15 Black Ledge Drive, 897 F.2d 97 (2d Cir. 1990) 29, 43, 44, 46

United States v. Property Known as 6109 Grubb Road, 886 F.2d 618 (3rd Cir. 1989) 36

United States ex. rel. Ryan v. Broderick, 59 F.Supp. 189 (D. Kan. 1945) 41

United States v. 2511 E. Fairmont Ave., Baltimore, Md., 722 F.Supp. 1273 (D.Md. 1989) 44, 45

Walgren v. Howes, 482 F.2d 95 (1st Cir. 1978) 32

Yong Hong Keung v. Dulles, 127 F.Supp. 252 (D. Mass. 1954) 41

Statutes:

21 U.S.C. § 881 .....2, 3, 4, 26, 31, 34, 36, 38, 42, 44, 45, 46

Fed. R. Civ. P. 56 .....5, 31, 32, 33, 37, 40, 41, 42, 49

Other Authorities:

Joint Explanatory Statement of Titles II and III reprinted in 7 U.S. Cong. & Admin. News (1978) 35

Wright, Miller & Kane, 10 Federal Practice and Procedure § 2712 (2d ed. 1983) 33, 41

IN THE SUPREME COURT OF THE UNITED STATES

_____Term, 1990

ELIZABETH AIELLO, Petitioner,

v.

UNITED STATES OF AMERICA, Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

Petitioner, Elizabeth Aiello, respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above-entitled proceeding on August 6, 1990.

OPINIONS BELOW

The opinion of the United States

Court of Appeals for the Second Circuit is reported at 912 F.2d 4 (2d Cir. 1990), and is reprinted in the appendix hereto at p. A-1 infra. The opinion of the United States District Court for the Eastern District of New York has not been reported. It is reprinted in the appendix hereto at A-9, infra.

JURISDICTION

Between 1984 and 1986, the United States instituted seventeen civil forfeiture proceedings under 21 U.S.C. § 881 against land, buildings, bank accounts and jewelry owned by either or both Elizabeth Aiello, her husband Antonino "Anthony" Aiello or corporations of which one of them is a principal. Mrs. Aiello claimed an ownership interest in the properties that were the subject of twelve of these actions, alleging that she was entitled to the "innocent owner" defense provided by

21 U.S.C. § 881(a)(6) and (a)(7).

The government subsequently moved for summary judgment in all seventeen actions, which had been consolidated. On October 11, 1989, the United States District Court for the Southern District of New York entered an order granting the Government's motion for summary judgment. Although the District Court rejected Mrs. Aiello's subsequent request for a stay, on April 25, 1990, the United States Court of Appeals for the Second Circuit issued an order staying execution of the District Court's judgment of entered in the District Court during the pendency of Mrs. Aiello's appeal. On August 6, 1990, however, the Second Circuit affirmed the District Court's order.

Jurisdiction for this appeal exists under 28 U.S.C. § 1254 (1).

STATUTE INVOLVED

21 U.S.C. § 881 Forfeitures

(a) Property Subject

The following shall be subject to forfeiture to the United States and no property right shall exist in them:

(6) All moneys, negotiable instruments, securities, or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance in violation of this subchapter, all proceeds traceable to such an exchange, and all moneys, negotiable instruments, and securities used or intended to be used to facilitate any violation of this subchapter, except that no property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or

consent of that owner.

(7) All real property, including any right, title, and interest (including any leasehold interest) in the whole of any tract of land and any appurtenances or improvements, which is used, or intended to be used, in any manner or part, to commit, or to facilitate the commission of, a violation of this title punishable by more than one year's imprisonment, except that no property shall be forfeited under this paragraph, to the extent of an interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.

Rule 56. Summary Judgment

(c) Motion and Proceedings thereon

The motion shall be served at least 10 days before the time fixed for the hearing. The adverse party prior to the

day of hearing may serve opposing affidavits. The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. A summary judgment, interlocutory in character, may be rendered on the issue of liability alone although there is a genuine issue as to the amount of damages.

(c) Form of affidavits; further testimony; defense required

Supporting and opposing affidavits shall be made on personal knowledge, shall set forth such facts as would be admissible in evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated therein.

Sworn or certified copies of all papers or parts thereof referred to in an affidavit shall be attached thereto or served therewith. The court may permit affidavits to be supplemented or opposed by depositions, answers to interrogatories or further affidavits. When a motion for summary judgment is made and supported as provided in this rule, an adverse party may not rest upon the mere allegations or denials of his pleading, but his response, by affidavits or as otherwise provided in this rule, must set forth specific facts showing that there is a genuine issue for trial. If he does not so respond, summary judgment, if appropriate, shall be entered against him.

STATEMENT OF THE CASE

Elizabeth Aiello is the wife of Antonino "Anthony" Aiello. In February 1988, Mr. Aiello was convicted, after a

jury trial in the United States District Court for the Southern District of New York, of operating a continuing criminal enterprise, conspiracy to distribute and possess heroin and cocaine and nine substantive counts involving the distribution and possession of heroin and cocaine. Although she has never been charged with narcotics crimes, Mrs. Aiello was tried with her husband and convicted of (1) harboring and concealing her husband while he was a fugitive on federal drug charges and (2) perjury for testimony she gave at depositions held in connection with the civil forfeiture cases at issue here.

Between 1984 and 1986, the government instituted forfeiture proceedings against real estate, bank accounts and jewelry owned by either or both Elizabeth Aiello, her husband or corporations of which one of them is a principal. Mrs. Aiello has

asserted an ownership interest in the following parcels of real property forfeited under the summary judgment order:

> a) 78-84 West 125th Street, New York New York, a commercial building with title in the name of Gambi Realty Corporation, a New York corporation of which Mrs. Aiello is the president;
>
> b) 321-325 West 125th Street, New York, New York, a commercial building with title in the name of Det-Al Food Corporation, a New York corporation of which Mrs. Aiello is the president;
>
> c) 75-21 Caldwell Avenue, Queens, New York, a residential dwelling with a separate apartment where Mrs. Aiello presently resides;
>
> d) 66-20 Fresh Pond Road, Queens, New York, a building which formerly housed the Cafe Aiello, as well as two apartments, owned by Det-Al Food Corporation;
>
> e) a 94 acre farm in New Baltimore, New York (Greene County) with title in the name of Elizabeth Aiello;
>
> f) a 104.5 acre farm in Coxsackie New York (Greene County) with title in the name of Antonino

and Elizabeth Aiello.

Additionally, Mrs. Aiello asserted an ownership interest in the following bank accounts:

> a) approximately $250,000 in 8 accounts at Hamburg Savings Bank (now Home Savings Bank);
>
> b) $3,136.17 in an account in the name of Betty 'N' Jenny's Pizza, an unincorporated business once managed by Mrs. Aiello;
>
> c) approximately $25,000 in an account at Manufacturers Hanover Trust Company in the name of Gambi Realty; and
>
> d) approximately $109,000 in a bank account at Long Island Trust Company in the name of Gambi Realty, Incorporated.

Mrs. Aiello also asserted an ownership interest in several pieces of jewelry seized from her residence at 75-21 Caldwell Avenue, Queens, New York.

Premises Which Allegedly Facilitated Narcotics Crimes

In its summary judgment motion, the

government maintained that three of the parcels of real estate in which Mrs. Aiello had asserted an ownership interest were subject to forfeiture under 21 U.S.C. §881 (a)(7) because they had been used to facilitate narcotics transactions. With respect to this issue, the following evidence was presented to the District Court.

To support its claim that 78-84 West 125th Street was a distribution point for drugs, the government relied upon statements made by Lawrence "Big Al" Robinson, a street level narcotics dealer who testified at Antonio Aiello's criminal trial. According to Robinson, Giuseppe Giusto used the pizzeria as meeting place to deliver packages of heroin. However, the government produced no evidence that Mrs. Aiello was involved in narcotics trafficking at 78-84 West 125th Street or that she was aware that drug-related activities

were occurring at those premises.

Similarly, the government relied upon testimony from Richard Ford, an undercover police officer who testified at Mr. Aiello's drug trial, to support its claim that the Cafe Aiello, 66-20 Fresh Pond Road, Queens, New York, was the Queens hub of the Aiello drug organization. Ford stated that he had telephoned Giuseppe Giusto at the Cafe Aiello to make appointments for narcotics-related meetings and that Antonino Aiello used the Cafe Aiello as a place to meet with his underlings. Ford tried, on one occasion, to purchase heroin directly from Antonino Aiello at the cafe but was unable to do so.

In addition, the government asserted that narcotics-related documents, including papers containing calculations involving substantial sums of money, were discovered during a search of the Cafe Aiello

on November 14, 1984. However, neither Ford's testimony nor the physical evidence discovered during the search of the Cafe Aiello implicated Mrs. Aiello in the illegal activities which allegedly occurred there. Nor was there any evidence that Mrs. Aiello knew or should have known that others were using Cafe Aiello to facilitate their drug trafficking activities.

Finally, the government noted that a search of the Aiello family residence at 75-21 Caldwell Avenue, Queens, New York, had produced several handguns, $105,000 in cash, and a ledger book which the government deemed a record of narcotics transactions.[1] A few pages in this book were written by Elizabeth Aiello. The Govern-

---

[1] Because it is unclear where these items were found, it is impossible to determine whether Mrs. Aiello knew or should have known of the presence of these items in her house.

ment also claimed -- based upon physical surveillance and wiretaps -- that Antonino Aiello had used a telephone at the Caldwell Avenue residence to discuss a drug deal and that he had received drugs there.

At her depositions, Mrs. Aiello stated that the purported narcotics ledger seized from her Caldwell Avenue home actually belonged to one of her tenants, Maria DiGangi. Mrs. Aiello acknowledged that at least two pages in the ledger book were in her own handwriting. But, she maintained that these entries were made at Ms. DiGangi's request. Mrs. Aiello was unable to explain what any of these entries meant. Mrs. Aiello acknowledged that, for ten or twelve years prior to her deposition, Mr. Aiello was periodically absent from their home. She never questioned him about his whereabouts during these absences. But, she was convinced,

nonetheless, that he was not doing anything wrong and that he was employed in only lawful pursuits.

Real Estate Allegedly Purchased with Proceeds of Narcotics Crimes

In addition to claiming that three of the properties in which Mrs. Aiello had asserted an ownership interest had been used to facilitate narcotics crimes, the government also asserted that all of the real estate, bank accounts and jewelry in which she had asserted an ownership interest were either the proceeds of narcotics transactions or purchased with the proceeds of narcotics transactions. With respect to this issue, the following evidence was presented to the District Court.

At depositions held in connection with the forfeiture actions, Mrs. Aiello testified that she formed the Det-Al Food Corporation in 1978 to open a cafe. She

had served as the corporation's president since its inception, and she was the only person with the authority to sign checks.

In 1978, Det-Al Food Corporation acquired the building at 321-325 West 125th Street. Mrs. Aiello could not recall where she had obtained the $25,000 which was paid upon signing of the contract for sale. The $30,000 due upon closing was paid with bank checks drawn upon four different banks. Mrs. Aiello noted that one of these checks was from a bank at which she maintained a personal account and that another was from a bank where she maintained the Betty 'N' Jenny's Pizza account. Consequently, she theorized that these two checks represented funds taken from her personal and business accounts. She surmised that the other two checks noted on the closing statement might have been money which she had borrowed.

Mrs. Aiello stated that rents from the tenants at 321-325 West 125th Street were deposited in the Det-Al checking account. Checks from this account were used to pay the mortgage for this property.[2] Documents provided by the government in the course of Mrs. Aiello's deposition demonstrated conclusively that the rental income had always been sufficient to cover both the monthly mortgage and the building's annual expenses.[3]

In March 1981, Det-Al Food Corporation acquired 66-20 Fresh Pond Road, which housed the Cafe Aiello. At the time of Mrs. Aiello's deposition, the cafe was

---

[2] According to a closing statement entered into evidence at her deposition, there was a purchase money mortgage on the property for $195,000. The sale price of the property was $250,000.

[3] To prove this claim, documentary evidence was submitted to the District Court as an exhibit to her attorney's memorandum.

still in business, but it was managed by an individual who leased it from the corporation.

Documentary evidence introduced during Mrs. Aiello's deposition established that the sum of $8,000 paid upon signing the contract for sale came from the Gambi Realty Corporation account. The balance due at the closing ($67,299) was paid with eight different checks. Mrs. Aiello did not remember the source of these funds, nor could she recall if she had borrowed any money to purchase Cafe Aiello. However, a letter from the Aiellos' lawyers showed that three of the checks came from their business at 84-125th Street. And, the closing statement for 66-20 Fresh Pond Road indicates that two checks came from a bank where Mrs. Aiello maintained an account for Betty 'N' Jenny's Pizza.

Gambi Realty Corporation (hereinafter

"Gambi) was formed in 1978 to buy the property at 78-84 West 125th Street, and its sole business was managing that property. Mrs. Aiello stated at, her deposition, that she was the president of Gambi and the only person with the authority to write checks on the Gambi account.[4] Mrs. Aiello had used Gambi checks to pay Vinnie, who collected rents for her at 78-84 West 125th Street and other properties, and to pay the mortgage on 78-84 West 125th Street.

Although the name of her brother-in-law, Fillipo Gambina, appeared on a contract to purchase the building, Mrs. Aiello testified that she herself had decided

---

[4] Mrs. Aiello could not recall whether Gambi Realty had ever had corporate officers other than herself; nor could she recall if the corporation had ever had any employees. However, she steadfastly maintained that she had never had any partners in the corporation.

to buy the building. She denied that she and her brother-in-law had ever discussed the possibility of a joint purchase. Mrs. Aiello was unable to recall who paid the $10,000 due upon the signing of the purchase contract.

At her deposition, Mrs. Aiello was shown checks made out to Fillipo Gambina ($10,000), Giuseppe Bologna ($5,000) Vincenzo Bologna ($10,000), Vito Aiello ($10,000 and $5,0000) and Andria LaRocca ($10,000) respectively. Each payee had indorsed his check over to Mrs. Aiello and she, in turn, had indorsed it over to the seller of 78-84 West 125th Street. The government's attorney suggested that she had supplied these individuals with money to obtain these checks. But, Mrs. Aiello denied this accusation and maintained that she had borrowed this money from her brother-in-law, her father-in-law and her

husband's friends. She also stated that she had borrowed money from her children's bank accounts.

The New Baltimore farm was purchased in 1980 for $80,000. The sellers received a down-payment of $30,000, and a mortgage for $50,000 was given to Anna Farr. Mr. Aiello received closing documents from the Aiellos' attorney which indicated that $25,000 from Gambi Realty Corporation was used to purchase the New Baltimore Farm. In addition, Mrs. Aiello recalled that $7,500 from the Betty 'N' Jenny's Pizza account was used towards the purchase.

Mrs. Aiello could not recall whether the $30,000 down-payment was paid by cash or check, nor could she remember if she borrowed this money or if it came from her bank accounts. Mrs. Aiello did, however, remember making mortgage payments for the New Baltimore farm, although she could not

recall the account or accounts from which she withdrew the money for the mortgage payments. However, her lawyer noted, in his memorandum in opposition to the summary judgement motion, that documentary evidence including cancelled checks would show that rents paid on Mrs. Aiello's properties on Pitkin Avenue in Brooklyn were the source of the mortgage payments for the New Baltimore farm.

In September 1981, Mrs. Aiello and her husband purchased their home at 75-21 Caldwell Avenue, Queens, New York. Although the contract for sale specified a purchase price of $152,000, the closing statement indicated a sale price of $102,000. Mrs. Aiello could not explain this discrepancy.

There was undisputed evidence that Mrs. Aiello had obtained a mortgage from Astoria Federal Savings and Loan Associa-

tion for $39,000. But, except for this mortgage, Mrs. Aiello could not recall if he she had borrowed money from anyone else in order to purchase the Caldwell Avenue home. Mrs. Aiello believed that at least one of the checks used for the closing might have come from her account at Manufacturers Hanover, but she did not recall having accounts at the banks on which other checks used for the closing were drawn.

In March 1982, Mrs. Aiello and her husband closed on the farm in Coxsackie, New York. The full purchase price of $50,000 was paid by seven bank checks drawn on the Hamburg Savings Bank. Mrs. Aiello testified that the money for these checks came from her personal accounts at Hamburg Savings Bank. The passbooks for the accounts reflected these withdrawals and corroborated her testimony. She could

not recall why seven separate checks were issued instead of a single check.

Jewelry

Assorted pieces of jewelry were found during a search of the Aiellos' home at Caldwell Avenue. Mrs. Aiello claimed twenty-five pieces of this jewelry. She testified that she had received some of these items as gifts from her husband. Other pieces had been remodeled or remade from jewelry given to her by her grandfather when he came to live with her in the 1960's. Mrs. Aiello could not provide receipts for any of the jewelry, nor could she remember the name of the jeweler who had reset and remodeled pieces given to her by her grandfather. According to the affirmation submitted in support of the government's motion for summary judgment, "Big Al" Robinson had stated that the "Aiello organization" sometimes ac-

cepted jewelry as payment for drugs.

Bank Accounts

Two of the four bank accounts in which Mrs. Aiello asserted an ownership interest were opened to receive rents paid by tenants to Gambi realty. As her lawyer noted in his memorandum in opposing summary judgment, an analysis of those accounts suggested that the deposits to those accounts came from Gambi's tenants at 290 Lenox Avenue. That property alone was source of substantial income -- for example, the tenants there paid $137,450 rent in 1985 and $188,650 in rent in 1986.

Based upon lease documents provided by the government at her deposition, it appeared that Mrs. Aiello was collecting gross rental income exceeding $265,000 in 1984 and that by 1986, gross rental income, on an annual basis, had increased to almost $420,000. More importantly, there

was evidence that Mrs. Aiello was the sole owner of three properties on Pitkin Avenue, Brooklyn, New York which provided her with rental income. Significantly, the government never claimed that any of these Pitkin Avenue properties was subject to forfeiture under 21 U.S.C.§ 881, even though one of these buildings housed Betty 'N' Jenny's Pizza and the government sought to forfeit a bank account in the name of that business.

Finally, by 1984, the Aiellos were operating no less than seven separate businesses: two pizzerias in Harlem, two pizzerias in Brooklyn, the Cafe on Fresh Pond Road, another pizzeria on Knickerbocker Avenue and a grocery store on Myrtle Avenue in Brooklyn. For the most part, these businesses were family owned and operated.

Evidence of Reported Income

For the years 1955 through 1988, records of the Social Security Administration credited Antonino Aiello for earnings of $164,858 and Elizabeth Aiello for earnings of $107,669.65. Joint income reported by the Aiellos on their tax returns for 1977-1980 was as follow: 1977 - $17,551; 1978 - $36,375; 1979 - $43,493; and 1980 - $42,794. The Aiello's reported an adjusted gross income of $50,431 in 1981 and $48,219 in 1982.

Decisions of the District Court and the Court of Appeals

Notwithstanding the foregoing evidence, the District Court granted the government's motion for summary judgment. The District Court found that Mr. Aiello "was not of the means independently to support his many investments without illegally gotten gains." (A 4_) The District Court also found that Mrs. Aiello's

"entire working career lasted a mere nine months and all of her income and assets were attributable to the activities of Antonino Aiello." (A 4)

Characterizing the Aiellos' opposition as a vague promise that they would contradict the government's allegations at a trial, the District Court chided Mr. Aiello "for failing to produce sufficient evidence to rebut the Government's proof linking the properties to his enormous and illegal financial gains." (A10). And, in a footnote the district court held that the Aiellos had failed to proffer any facts that they were innocent property owners who were unaware that narcotics-related activities were occurring at certain premises. (A11).

The Court of Appeals devoted no more than a single paragraph to Mrs. Aiello's claim that the District Court had erred in

granting summary judgment. The Court of Appeals noted that Mrs. Aiello had not submitted an affidavit setting forth facts in support of her claim of innocent ownership, nor had she made an "averment that untainted proceeds were used to purchase" any of the properties in which she had asserted an ownership interest. (A5). Characterizing her lawyer's affirmation in opposition to summary judgment as a document which merely alleged what certain witnesses had told him they would say, the Court of Appeals dismissed it as insufficient to preclude summary judgment. Curiously, the Court of Appeals either overlooked or ignored documentary evidence appended to this attorney's submission.

The Court of Appeals took an equally myopic view of Mrs. Aiello's depositions:

> Her deposition testimony denies knowledge of her husband's involvement in drugs in 1976, a

> date that precedes the years in which he operated his narcotics enterprise. Totally lacking was the "detailed factual substance in support of her claim of ignorance," United States v. One Parcel of Property Located at 15 Black Ledge Drive, 897 F.2d at 102. (A5).

In fact, Mrs. Aiello had testified that her husband had been periodically absent from their home for a period of ten to twelve years prior to her depositions. This was exactly the time period when Mr. Aiello was allegedly running a narcotics trafficking organization. In addition to misinterpreting Mrs. Aiello's testimony, the Court of Appeals also overlooked testimonial and documentary evidence demonstrating that funds from legitimate businesses were used to purchase various properties claimed by Mrs. Aiello.

REASONS FOR GRANTING THE WRIT

I.

This Court's opinion in Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), and the procedural peculiarities associated with 21 U.S.C. § 881 have led lower courts to ignore the well settled prohibition against resolving disputes of fact and issues of credibility on a motion for summary judgment to transform Fed. R. Civ. P. 56 into an instrument of summary justice.

Rule 56 of the Federal Rules of the Federal Rules of Civil Procedure was never intended to create a procedure for summary trials. However, Mrs. Aiello's case is chilling proof of how Rule 56 is being transmuted, in forfeiture proceedings pursuant to 21 U.S.C. § 881, into a device for administering summary justice. Given the rising popularity of civil forfeiture statutes with state and federal law enforcement authorities, there is a real and present danger that more and more innocent citizens will be deprived of their property without ever having had a trial on

their claims. To avert a rush to judgment at the expense of innocent property owners, this Court should issue a writ of certiorari to review this case.

It would appear to be settled beyond cavil that summary judgment is not a substitute for a trial and that summary judgment may not be granted whenever there is a dispute regarding material issues of fact. Poller v. Columbia Broadcasting Systems, Inc., 368 U.S. 464, 467-468 (1962); Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620, 627 (1944); Walgren v. Howes, 482 F.2d 95, 98 (1st Cir. 1978); Perma Research & Development Co., 410 F.2d 572 (2d Cir. 1969); Krieger v. Ownership Corp., 270 F.2d 265 (3rd Cir. 1975). As one commentator has observed, "a court cannot try issues of fact on a Rule 56 motion but only is empowered to determine whether there are issues to be tried."

Wright, Miller & Kane, 10 Federal Practice and Procedure § 2712 at 574-575 (2d ed. 1983)

Moreover, to preserve his right to a trial, the party opposing summary judgment is not required to prove his case in a summary proceeding. As Justice Marshall observed in First National Bank of Arizona v. Cities Service Co., 391 U.S. 253, 288-289 (1968):

> . . . the issue of material fact required by Rule 56(c) to be presented to entitle a party to proceed to trial is not required to be resolved conclusively in favor of the party asserting its existence; rather, all that is required is that sufficient evidence supporting the claimed factual dispute be shown to require a jury or judge to resolve the parties' differing versions of the truth at trial.

Had the courts below applied these settled principles of law to Mrs. Aiello's case, they would have been compelled to reject the government's demand for summary

judgment. Notwithstanding the cursory and condescending review afforded her claims,[5] Mrs. Aiello did present substantial evidence which supported a statutory defense of innocent ownership and precluded the court from granting the government's motion for summary judgment.

"[T]he legislative history of 21 U.S.C. § 881(a)(6) makes clear that property is subject to forfeiture only to the extent it does in fact constitute drug proceeds; i.e., whatever the form of the property, it is forfeitable only to the extent that the property itself has a traceable connection to drug transactions." United States v. Premises Known as 2639 Meetinghouse, 633 F.Supp. 979, 987 (E.D. Pa. 1986), citing Joint Explanatory

---

[5] One detects more than a little chauvinism in the District Court's assertion that Mrs. Aiello's entire working career lasted "a mere nine months."

Statement of Titles II and III reprinted in 7 U.S. Cong. & Admin. News (1978) at 9522. Even a conviction for a narcotics crime does not estop a person from establishing that he used legitimate assets to acquire property the government seeks to forfeit. Furthermore, "[i]f legitimate assets are commingled with drug proceeds, only the drug proceeds, whatever their form, are subject to forfeiture." United States v. Premises Known as 2639 Meetinghouse, supra, 633 F.Supp. at 987.

Thus, her husband's conviction for narcotics trafficking, hardly foreclosed Mrs. Aiello from establishing that she had a legitimate proprietary interest in the various properties to which she had asserted a claim. Moreover, to avoid forfeiture of her ownership interests, she was required only to establish the extent to which funds untainted by any connection

with her husband's alleged narcotics dealing had been invested in each of these properties.[6]

The statute --specifically 21 U.S.C. § 881(a)(7) -- also provides an affirmative defense to a person who can show

---

[6] In some respects, Mrs. Aiello's plight is analogous to that of a lender whose loan is secured by real property subject to forfeiture as a consequence of the illegal acts of a third party. See e.g., United States v. Real Property in Sevier County, Tennessee, 703 F. Supp. 1306, 1312 (E.D. Tenn. 1989) (government conceded it could not forfeit interest of innocent third party whose loan to drug dealer was secured by a lien in the dealer's property); United States v. A Parcel of Real Property Situated in the City of Bal Harbour, Florida, 650 F.Supp. 1534 (E.D. La. 1987) (government could not forfeit bank's interest property which owner pledged as collateral for loan). Assuming arguendo that Antonino Aiello invested the proceeds of narcotics dealings in one or more of the properties in which Mrs. Aiello claims an interest, 21 U.S.C. § 881 entitles the government to only that portion of the property which constitutes narcotics proceeds. The government cannot deprive Mrs. Aiello of whatever interest she purchased with untainted funds.

either that he had no knowledge of drug trafficking on his property or that he did not consent to the use of his property for illegal activity. United States v. Property Known as 6109 Grubb Road, 886 F.2d 618, 626 (3rd Cir. 1989); United States v. Premises Known as 171-02 Liberty Avenue, 710 F.Supp. 46, 49 (E.D.N.Y. 1989). Even a wife whose husband has used their home to negotiate a drug deal can, provided she establishes lack of knowledge, successfully defend against forfeiture. See e.g., United States v. One Single Family Residence with Outbuildings Located at 15621 S.W. 209th Avenue, Miami, Florida, 699 F.Supp. 1531 (S.D. Fla. 1988).

A careful and dispassionate view of the record below reveals that Mrs. Aiello met her burden with respect to each of these statutory defenses. Indeed, the District Court had Mrs. Aiello's sworn

testimony, given at depositions held in connection with these forfeiture actions, that she had no knowledge of her husband's alleged involvement in narcotics trafficking.[7]

Her deposition testimony also established that she owned, or had owned, four buildings to which the government has never asserted a claim under 21 U..S.C. § 881. Moreover, each of these buildings produced income which Mrs. Aiello could have used towards the purchase of the

---

[7] This testimony was given in depositions held in connection with the forfeiture actions. Although part of her deposition testimony resulted in her conviction for perjury, the government never contended that her denial of any knowledge about illicit activities in which her husband was allegedly involved was perjurious. Furthermore, the fact that she was not indicted or charged with participating in the activities of the so-called Aiello drug organization gives credence to her claim that she had not slightest inkling that her husband was involved in illegal activities.

buildings to which the government had asserted a claim. And, there was documentary and testimonial evidence which established that she had actually invested such untainted funds in various properties in which she had asserted an ownership interest.[8]

There was also documentary and testimonial evidence that funds obtained from institutional sources -- i.e., mortgages from banks -- were also used to finance, in part, the purchase of some of the con-

---

[8] For example, Mrs. Aiello testified that $7,500 from the Betty 'N' Jenny's Pizza account was used towards the purchase of the New Baltimore Farm. The full purchase price of the Coxsackie Farm ($50,000) was paid by seven bank checks drawn on the Hamburg Savings Bank. Mrs. Aiello testified that the money for these checks came from her personal accounts at Hamburg Savings Bank, and the passbooks for the accounts reflected these withdrawals.

tested properties.[9] In addition, two buildings -- the New Baltimore farm and 321-325 West 125th Street -- were financed in large part by purchase money mortgages from sellers. Some of these purchases were self-financed, in the sense that rents from the property itself covered the mortgage payments.[10] In short, there was ample evidence that Mrs. Aiello had access to untainted money which she used towards the purchase of the properties in which

---

[9] For example, Mrs. Aiello's deposition testimony and closing statements established that a mortgage from a savings and loan association provided part of the money used to purchase the Aiellos' home on Caldwell Avenue.

[10] For example, Mrs. Aiello paid the mortgage for 321-325 West 125th Street with checks drawn on this account. Documents provided by the government in the course of Mrs. Aiello's deposition demonstrated conclusively that the rental income had always been sufficient to cover both the monthly mortgage and the building's annual expenses.

she asserted an ownership interest.[11]

It is unclear why both the District Court and the Court of Appeals ignored this evidence. Both courts chided Mrs. Aiello and her husband for their failure to provide affidavits. However, Rule 56 does not limit to affidavits, matters which may be considered on the motion. Yong Hong Keung v. Dulles, 127 F.Supp. 252 (D. Mass. 1954). To the contrary, a "court is obliged to take account of the entire setting of the case" when deciding a motion for summary judgment. Wright, Miller & Kane, 10 Federal Practice and

---

[11] Of course, the fact that she owned properties and businesses which generated untainted money also created a material issue of fact with respect to the various bank accounts that the government sought to forfeit. As for her claim that various pieces of jewelry were gifts from her husband and her grandfather, her testimony created a clear issue of credibility which the courts had no authority to resolve on a summary judgment motion.

Procedure § 2721 at 44. See also Amman v. Home Inv. Co., 243 F.2d 748, 758 (9th Cir. 1945); United States ex. rel. Ryan v. Broderick, 59 F.Supp. 189, 192-193 (D. Kan. 1945). Moreover, Rule 56 expressly authorizes a court to consider depositions and exhibits[12] when deciding a summary

---

[12] Perhaps Mrs. Aiello's attorney did not precisely observe the formalities governing the use of exhibits to oppose a summary judgment motion -- i.e., he appears not to have complied with the requirement that papers attached to an affidavit be sworn or certified. However, any formal defects in counsel's affidavit were waived by the Government's failure to make a timely motion to strike his response to the motion for summary judgment. Auto Drive-Away Company of Hialeah, Inc. v. I.C.C., 360 F.2d 446 (5th Cir. 1966). And, as one authority has noted, "unsworn or otherwise inadmissible documents may be considered by the court if not challenged." Wright, Miller & Kane, 10 Federal Practice and Procedure § 2722 at 60. See also Equia v. Tompkins, 756 F.2d 1130, 1136 (5th Cir. 1985). This especially true when, as in the instant case, the opposing party has himself utilized the same documents, to advance his own arguments. See e.g., Townsend v. Columbia Operations, 667 F.2d 844 (9th Cir. 1982). Indeed, documentary evidence -- e.g., cancelled checks,

judgment motion. See e.g., Pollack v. City of Newark, New Jersey, 147 F.Supp. 35, 39, (D. N.J. 1956), aff'd 248 F.2d 543 (3rd Cir. 1957) cert. denied, 355 U.S. 964 (1958). In fact, it was not a lack of evidence but their utilization of an erroneous legal standard which caused both the District Court and the Court of Appeals to grant summary judgment against Mrs. Aiello and the properties in which she asserted an ownership interest.

Indeed, the Second Circuit, as well as a few other Circuits, have, in proceedings pursuant to 21 U.S.C.§ 881, all but suspended the constraints which normally govern the resolution of motions for summary judgement. See, e.g., United States

---

closing statements and letters from the lawyers who handled Mrs. Aiello's business and real estate matters -- were introduced by the government at Mrs. Aiello's depositions. In addition, they were included in the appendix for the Second Circuit.

v. Property Located at 15 Black Ledge Drive, 897 F.2d 97, 101 (2d Cir. 1990); One Blue 1977 AMC Jeep CJ-5 v. United States, 783 F.2d 759 (8th Cir. 1986); United States v. One Motor Yacht Named Tahuna, 702 F.2d 1276, 1283 (9th Cir. 1983). Regrettably, this Court's opinion in Anderson v. Liberty Lobby, Inc., 477 U.S. 242 (1986), seems to have spawned this situation.

In Anderson this Court held "that the inquiry involved in ruling on a motion for summary judgment or for a directed verdict necessarily implicates the substantive evidentiary standard of proof that would apply at the trial on the merits." 477 U.S. at 252. From this observation, the Second Circuit has extrapolated a rule which entitles the government, in a forfeiture action pursuant to 21 U.S.C. § 881, to summary judgment unless a claimant

has substantially proved his statutory defense of innocent ownership. See e.g., United States v. Property Located at 15 Black Ledge Drive, supra, 897 F.2d at 101.

The primary defect in the Second Circuit's rule, however, is that it violates the older and well-established rule that courts may not decide issues of fact and credibility on a summary judgment motion. Indeed, as one court has noted a determination that a claimant has not substantially proved the statutory innocent ownership defense necessarily requires a court to resolve issues of fact and credibility. United States v. 2511 E. Fairmont Ave., Baltimore, Md., 722 F.Supp. 1273, 1273 (D.Md. 1989).[13]

---

[13] In that case, the parents of a suspected drug dealer admitted knowledge of certain suspicious, if not blatantly incriminating, facts -- for example, the parents knew that on one occasion narcotics police had searched one of the

Concededly, 21 U.S.C. § 881 places upon the claimant the ultimate burden of proving that the factual predicates for forfeiture have not been met. But, the statute's peculiar allocation of the burden of proof at a trial should not be construed a license authorizing courts to determine issues of fact and credibility on a summary judgment motion.

And, while this Court's opinion in Anderson does contain some highly mis-

---

houses that the government was seeking to forfeit and that on another occasion armed assailants had searched that same home looking for drugs and money -- but denied any actual knowledge of their son's narcotics trafficking activities. The district court observed that the issue of the parents' knowledge was unsuitable for resolution by way of summary judgment "inasmuch as a determination of their credibility [was] involved." United States v. 2511 E. Fairmont Ave., Baltimore, Md., supra, 722 F.Supp. at 1281.

leading language,[14] it does not support the rule enunciated by the Second Circuit in United States v. Property Located at 15 Black Ledge Drive. To the contrary, even the Anderson majority acknowledged that "[c]redibility determinations, the weighing of the evidence, and the drawing of legitimate inferences from the facts are jury functions, not those of a judge. . ." Anderson v. Liberty Lobby, Inc., supra, 477 U.S. at 255.

In short, the Second Circuit's rule requiring claimants opposing a motion for summary judgment in a proceeding pursuant to 21 U.S.C. § 881 to substantially prove their defenses ignores well settled prin-

---

[14] As Justice Brennan observed in his dissent, the majority opinion in Anderson is "full of language which could surely be understood as an invitation -- if not an instruction -- to trial courts to assess and weigh evidence much as a juror would. Anderson v. Liberty Lobby, Inc., supra, 477 U.S. at 266.

ciples governing the resolution of summary judgment motions. If an alternative standard is necessary for deciding summary judgment motions in cases where the defendant bears the ultimate burden of proof at trial, the appropriate paradigm can be found in Justice Brennan's dissenting opinion in Celotex Corp. v. Catrett, 477 U.S. 317, 332 (1986) (Brennan, J., dissenting).[15]

In Celotex, Justice Brennan acknowledged that the party who bears the burden of persuasion at trial must also

---

[15] Although Justice Brennan dissented from the result in Celotex, the majority did not disagree with his statement of the principles governing the disposition of summary judgment motions. Justice Brennan dissented from the majority's opinion only because he and the majority could not agree on how these principles should be applied to the facts. Celotex Corp. v. Catrett, 477 U.S. at 344. Consequently, the majority opinion does preclude this Court from adopting Justice Brennan's paradigm.

bear the burden of persuasion on a summary judgment motion, even if he has not moved for summary judgment. However, Justice Brennan's opinion emphasizes that a movant seeking summary judgment against the party who bears the ultimate burden of persuasion at trial is entitled to summary judgment only if the movant demonstrates that there is no evidence in the record to support a judgment for the nonmoving party. Celotex v. Catrett, supra, 477 U.S. at 332.

If the standard set forth in Justice Brennan's Celotex opinion is applied in forfeiture actions pursuant to 21 U.S.C. §881, the government is entitled to summary judgment only if it can show that there is no evidence in the record to support a claim of innocent ownership. Conversely, where, as in the instant case there is some evidence supporting an "in-

nocent owner" defense -- e.g., Mrs. Aiello's testimony at depositions and documentary evidence -- summary judgment may not be granted.

While the principles set forth in Justice Brennan's dissent seem almost self-evident, there is an urgent need for this for Court to demonstrate how Justice Brennan's paradigm is to be applied to the concrete facts of a particular case. As Chief Justice Rehnquist has observed, a major flaw in the majority opinion in Anderson, is the absence of clear examples of how courts are to take into account burdens of proof and persuasion when deciding summary judgment motions:

> The Court, I believe, makes an even greater mistake in failing to apply its newly announced rule to the facts of this case. Instead of thus illustrating how the rule works, it contents itself with abstractions and paraphrases of abstractions, so that its opinion sounds much like a

> treatise about cooking by someone who has never cooked before and has no intention of starting now.

Anderson v. Liberty Lobby, Inc., supra, 477 U.S. at 269 (Rehnquist, C.J., dissenting). Mrs. Aiello's case demonstrates how this flaw in the Anderson opinion has led the lower courts to transform Rule 56 into an instrument of summary justice. This Court can, and should, rectify this sad state of affairs by granting her application for a writ of certiorari.

CONCLUSION

For the above-stated reasons, this petition for certiorari should be granted.

Respectfully Submitted,

LARRY BRONSON
Attorney for Petitioner
Elizabeth Aiello
654 Avenue C
Bayonne, New Jersey 07002
Tel. No. 201-858-8338

APPENDIX

Opinion of the Second Circuit
Court of Appeals.....A-1

Opinion of the United States
District Court for the Southern
District of New York (Duffy, J.)....A-9

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

No. 1175—August Term 1989

Argued: April 26, 1990 Decided: August 6, 1990

Docket No. 89-6281

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

—v.—

ELIZABETH AIELLO,

Defendant-Appellant.

Before:

VAN GRAAFEILAND, NEWMAN, and KEARSE,

Circuit Judges.

Appeal from the October 11, 1989, judgment of the District Court for the Southern District of New York (Kevin Thomas Duffy, Judge) forfeiting to the United States real and personal properties claimed by plaintiffs.

Affirmed.

MICHAEL D. RIPS, New York, N.Y. (Wright Manning & Rips, New York, N.Y., on the brief), *for defendant-appellant.*

EDWARD T. FERGUSON, III, Asst. U.S. Atty., New York, N.Y. (Otto G. Obermaier, U.S. Atty., Pamela L. Dempsey, Asst. U.S. Atty., New York, N.Y., on the brief), *for plaintiff-appellee.*

JON O. NEWMAN, *Circuit Judge*:

This appeal concerns primarily the esoteric question of whether appellate jurisdiction exists over a judgment in a civil forfeiture action in the absence of a stay of execution of the judgment. Elizabeth Aiello appeals from the October 11, 1989, judgment of the District Court for the Southern District of New York (Kevin Thomas Duffy, Judge) forfeiting to the United States real and personal properties claimed by Aiello and her husband, Antonino. The properties were alleged to have been purchased with proceeds from a narcotics enterprise operated by Antonino, *see* 21 U.S.C. § 881(a)(6) (1988), and some were alleged to have been used in connection with the enterprise, *see id.* § 881(a)(7) (1988). We conclude that appellate jurisdiction exists, at least as to all assets that have not been sold, and that, on the merits, forfeiture was properly ordered.

Background

Between 1984 and 1986 the United States filed seventeen civil forfeiture actions against land, buildings, bank

accounts, and jewelry owned by either or both of the Aiellos or corporations of which one of them was a principal. The Government also indicted Antonino for various narcotics offenses, including operating a continuing criminal enterprise in violation of 21 U.S.C. § 848 (1988). Elizabeth was charged with harboring a fugitive and perjury. Both were convicted. Antonino was sentenced to life imprisonment plus 140 years and fined $550,000. Elizabeth was placed on probation for three years. The trial evidence overwhelmingly established a massive heroin and cocaine distribution network run by Antonino in New York City. The enterprise provided Antonino with enormous profits, which the Government alleges were placed in the bank accounts and used to purchase the real and personal properties sought to be forfeited.

Elizabeth filed claims in twelve of the seventeen forfeiture actions, all of which had been consolidated. She claimed an ownership interest in the properties that were the subject of these twelve actions and alleged that she was entitled to the "innocent owner" defense afforded by 21 U.S.C. § 881(a)(6), (7). The Government successfully moved for summary judgment. Once the judgment was entered and the automatic ten-day stay period expired, Fed. R. Civ. P. 62(a), the Government proceeded to enforce its judgment. The money in the forfeited bank accounts was deposited into the United States Treasury, and the judgment was recorded in the appropriate land records against the forfeited real estate. Thereafter, Elizabeth moved in the District Court for a stay, which Judge Duffy denied. Several months later, during which no motion for a stay was made in this Court, the Government sold two of the forfeited proper-

ties. After hearing oral argument, we granted a stay pending disposition of the appeal.

Discussion

The Government asserts that appellate jurisdiction was extinguished once control of the forfeited properties passed from the District Court to the United States. It is not entirely clear from the Government's brief whether it believes this occurred immediately upon the expiration of the ten-day stay provided by Rule 62(d) or after the Government acted to enforce its judgment by recording the judgment on the land records and moving the funds in the seized accounts into the Treasury. In support of its challenge to appellate jurisdiction, the Government asserts two propositions: (1) removal of a *res* from a court's territorial jurisdiction terminates a court's *in rem* jurisdiction, and (2) once forfeited property is released from a court's control, the court loses jurisdiction over the property.

The first proposition has been widely invoked as to movable property, *see, e.g.*, *United States v. One Lear Jet Aircraft, Serial No. 35A-280*, 836 F.2d 1571, 1573 (11th Cir. 1988) (in banc) (airplane); *Bank of New Orleans and Trust Co. v. Marine Credit Corp.*, 583 F.2d 1063, 1067-68 (8th Cir. 1978) (equipment), though it would seem to have no application to real estate, at least land and any buildings not destroyed. The second proposition, which is of less certain validity,[1] has also been

1 The proposition that jurisdiction exists only as long as property remains within the "control" of the court, rather than merely within its territorial jurisdiction where it is amenable to control, seems premised on the view that the initial exercise of jurisdiction requires process, such as seizure, that brings the property within the control of the court. There are Supreme Court statements on both sides of this prop-

frequently asserted as to movable property, *see, e.g.*, *United States v. $2,490.00 in U.S. Currency*, 825 F.2d 1419, 1420 (9th Cir. 1987) (money); *United States v. $79,000 in United States Currency*, 801 F.2d 738, 739 (5th Cir. 1986) (same); *United States v. 66 Pieces of Jade and Gold Jewelry*, 760 F.2d 970, 973 (9th Cir. 1985) (jewelry), and as to real property that has been sold by the prevailing forfeiture judgment plaintiff, *United States v. Tit's Cocktail Lounge*, 873 F.2d 141, 144 (7th Cir. 1989). Both propositions are subject to an exception for property removed or released accidently, fraudulently, or improperly, *see The Rio Grande*, 90 U.S. (23 Wall.) 458, 465 (1874); *United States v. $57,480.05 United States Currency*, 722 F.2d 1457, 1458 (9th Cir. 1984).[2]

---

osition. *Compare Pennington v. Fourth National Bank*, 243 U.S. 269, 272 (1917) ("The only essentials to the exercise of the State's power are presence of the *res* within its borders, its seizure at the commencement of proceedings, and the opportunity of the owner to be heard."), *with Roller v. Holly*, 176 U.S. 398, 406 (1900) ("[I]f a lien already exists, whether by mortgage, *statute*, or contract, the court may proceed to enforce the same precisely as though the property had been seized upon attachment or execution.") (emphasis added). Professors Wright and Miller read *Pennoyer v. Neff*, 95 U.S. (5 Otto) 714 (1877), as not requiring seizure to invoke a court's *in rem* jurisdiction. C.A. Wright & A.R. Miller, 4 *Federal Practice and Procedure*, § 1070 at 427 (2d ed. 1987). Recently, we affirmed a judgment of forfeiture in a case where seizure was found to have been invalidly made. *See United States v. The Premises and Real Property at 4492 South Livonia Road*, 889 F.2d 1258, 1265-66 (2d Cir. 1989). If seizure bringing property within the court's control is not required to initiate the exercise of *in rem* jurisdiction, the surrender of control would seem not to terminate the court's jurisdiction, provided the property remains amenable to the court's process.

2 If it is so that a court normally loses *in rem* jurisdiction when the property is removed from its control, it is difficult to understand how the court may nonetheless exercise jurisdiction to determine if the property was removed accidentally, fraudulently, or improperly,

At most, these propositions concern *in rem* jurisdiction and do not necessarily determine whether an appellate court, asked to review a forfeiture judgment, may do so in the exercise of *in personam* jurisdiction over the prevailing plaintiff. That prospect was considered and rejected by a 6-5 vote of the in banc court in *One Lear Jet Aircraft*, 836 F.2d at 1574-77; *id.* at 1577 (Vance, J., with whom Hatchett and Anderson, JJ., join, dissenting); *id.* at 1580 (Clark, J., with whom Anderson, J., joins, dissenting); *id.* at 1584 (Edmondson, J., dissenting). We think the dissenters in *One Lear Jet* have the better of the argument. As they point out, the concepts of continuing territorial presence and control in forfeiture actions derive from the admiralty fiction of a ship's personality, a legal construct of dubious validity. *See* G. Gilmore & C. Black, *The Law of Admiralty*, 616 (2d ed. 1975) ("Abandonment of the fiction would seem to have been [*sic*] a clear gain for legal thought."). With the force of those concepts diminishing in admiralty, *see Continental Grain Co. v. Barge FBL-585*, 364 U.S. 19, 23 (1960); *Treasure Salvors, Inc. v. Unidentified Wrecked and Abandoned Sailing Vessel*, 569 F.2d 330, 334 & n.4 (5th Cir. 1978), they surely ought not to be routinely invoked to deny citizens an opportunity for appellate review of judgments forfeiting their property to the Government. In general, we agree with the late Judge Vance that the United States, "[h]aving submitted itself to the jurisdiction of the court, . . . should not be allowed to escape" appellate

---

thereby satisfying the exception to its loss of jurisdiction. Perhaps, in determining whether the "exception" applies, the court is really exercising *in personam* jurisdiction over the party who accidentally, fraudulently, or improperly removed the property.

review of the judgment it has obtained. 836 F.2d at 1579.

Even if we may review a forfeiture judgment in the exercise of *in personam* jurisdiction over the United States, we encounter two further obstacles in this case. In the absence of a stay, the Government caused the funds in the forfeited bank accounts to be deposited in the Treasury. The Government suggests that we are powerless to order return of these funds because this would entail an impermissible payment of funds without appropriation by Congress, in violation of the Appropriations Clause. U.S. Const. art. I, § 9, cl. 7. Though the Ninth Circuit has supported this view, *see United States v. $57,480.05 United States Currency*, 722 F.2d at 1459, we disagree. The Appropriations Clause concerns "public funds arising from taxes, customs, etc." *Varney v. Warehime*, 147 F.2d 238, 245 (6th Cir. 1945). We do not believe that funds collected by the United States pursuant to a judgment of the District Court are insulated by the Appropriations Clause from return to the rightful owner in the event of a reversal of that judgment simply because the funds are held in the Treasury during the course of the litigation.

The second obstacle arises as to two of the forfeited properties because the Government sold them during the interval after expiration of the automatic ten-day stay and prior to issuance of this Court's stay. In the view of the Seventh Circuit, a sale of forfeited property, in the absence of a stay of the forfeiture judgment, destroys appellate jurisdiction as to the sold property. *See United States v. Tit's Cocktail Lounge*, 873 F.2d at 144. While no stay was in effect, the Government was fully entitled to sell the properties. It is not clear whether the sales

impair our appellate jurisdiction or simply defeat the claimant on the merits in the absence of any challenge to the bona fides of the sale transactions. In either event, Mrs. Aiello secures no relief. Her claims with respect to all of the forfeited assets other than the two sold properties remain for consideration.

Having labored so extensively to afford Mrs. Aiello her day in this Court, we conclude, on examination of the merits, that her day will be extremely brief. The Government abundantly discharged its obligation to establish probable cause for the forfeitures, at which point it became Mrs. Aiello's burden to demonstrate the existence of a genuine issue precluding summary judgment. *See United States v. One Parcel of Property Located at 15 Black Ledge Drive*, 897 F.2d 97, 101 (2d Cir. 1990). Though alleging an innocent owner defense, she presented no affidavits presenting facts in support of her claim. She made no averment that untainted proceeds were used to purchase any of the properties. Her lawyer's affirmation, alleging only what certain witnesses had told him they would say, is insufficient. *See Wyler v. United States*, 725 F.2d 156, 160 (2d Cir. 1983). Her deposition testimony denies knowledge of her husband's involvement in drugs in 1976, a date that precedes the years in which he operated his narcotics enterprise. Totally lacking was the "detailed factual substance in support of her claim of ignorance," *United States v. One Parcel of Property Located at 15 Black Ledge Drive*, 897 F.2d at 102.

The judgment of the District Court is affirmed.

UNITED STATES OF AMERICA
SOUTHERN DISTRICT OF NEW YORK
----------X

U.S.D.C.
Filed
9/28/89

UNITED STATES OF AMERICA,
Plaintiff,

MEMORANDUM AND ORDER.

-against-

All Monies and other properties etc. (Antonino and Elizabeth Aiello, et al.)
Defendants.

----------X

84 Civ. 8867 (KTD)
84 Civ. 8870 (KTD)
84 Civ. 8871 (KTD)
84 Civ. 8872 (KTD)
85 Civ. 0124 (KTD)
85 Civ. 0126 (KTD)
85 Civ. 0127 (KTD)
85 Civ. 3040 (KTD)
85 Civ. 3042 (KTD)
85 Civ. 3044 (KTD)
85 Civ. 3045 (KTD)
86 Civ. 8858 (KTD)
86 Civ. 8873 (KTD)
87 Civ. 3947 (RPP)
88 Civ. 4758 (RO)
88 Civ. 7663 (KTD)
88 Civ. 7664 (KTD)

Appearances:

HON. BENITO ROMANO
United States Attorney for the
Southern District of New York
Attorney for the Plaintiff United
States of America
Of Counsel: Pamela L. Dempsey, Esq.

Assistant United States Attorney

RICHARD H. CHAMPION
1233 Twentieth Street, NW
Suite 800
Washington, D.C. 20036
Attorney for the Defendants
Antonino and Elizabeth Aiello, et al.

KEVIN THOMAS DUFFY, D.J.:

The United States of America moves for summary judgment under Fed. R. Civ. P. 56 in this civil action for forfeiture of numerous real and personal properties (the "properties") in several consolidated actions.[1] Claimants Antonino Aiello and

---

[1] The list of properties subject to forfeiture are [sic] as follows:

(a) 84 Civ. 8867: several bank accounts in the name of "Betty ' Jenny's Pizza."
(b) 84 Civ. 8870: Monies in the name of Vito Aiello at Maspeth Savings, et. al.
(c) 84 Civ. 8871: Separate listed account in the name of "Betty 'N Jenny's Pizza;" Aiello (Antonino and Elizabeth); Jane Gambina at National Westminster Bank.
(d) 84 Civ. 8872: A Manufacturers Hanover Trust Co. account in the name of "Gambi Realty, Inc."
(e) 85 Civ. 0124: 66-20 Fresh Pond Road,

various of his family members oppose the

Queens, N.Y. (a building which formerly housed "Cafe Aiello.") (claimed by Elizabeth Aiello).

(f) 85 Civ. 0126: 69-04 59th Drive, Queens, N.Y.

(g) 85 Civ. 0127: 75-21 Caldwell Ave., Queens, N.Y.

(h) 85 Civ. 3040: 78-84 West 125th Street, New York, N.Y. (in the name of Gambi Realty.")

(i) 85 Civ. 3042: 104.5 acre farm in Coxakie, N.Y. (claimed by Elizabeth Aiello.)

(j) 85 Civ. 3044: 321-325 West 125th Street, New York, N.Y. (a commercial building having the title: "Det-A1 Food Corp., claimed by Elizabeth Aiello.)

(k) 85 Civ. 3045: A 94 acre farm in New Baltimore (claimed by Elizabeth Aiello.)

(l) 86 Civ. 8858: A bank account at Long Island Trust Co. in the name of "Gambi Realty" (claimed by Elizabeth Aiello.)

(m) 86 Civ. 8873: A bank account at Coxsackie National Bank in the name of "AA Farms, Inc." (claimed by Antonino Aiello as the sole stockholder.)

(n) 87 Civ. 3947: Cash, a Rolex watch, and several cars claimed by Antonino Aiello.

(o) 88 Civ. 4758: Jewelry claimed by Elizabeth Aiello.

(p) 88 Civ. 7663: Partial interest taken by Antonino Aiello in a property located at 29 Lavery Street, Delmar, NY.

(q) 88 Civ. 7664: Antonino Aiello's interest in an investment in "Wildwood Bluffs Ltd.," a California Limited partnership.

motion. The Government seeks forfeiture of the properties pursuant to 21 U.S.C. § 881 (a)(6) (1982 & Supp. IV 1986), which, in pertinent part, states:

> The following shall be subject to forfeiture to the United States and no property right shall exist in them....All moneys,...or other things of value furnished or intended to be furnished by any person in exchange for a controlled substance ...[and] all proceeds traceable to such exchange.

21 U.S.C. §881(a)(6)(1982 & Supp. IV 1986) (emphasis supplied).

Antonino Aiello was prosecuted on a 27 count indictment that charged various felonies in connection with extensive drug operations run by Aiello and his many co-conspirators. On motion of Aiello's counsel, Aiello's first trial before me ended in a mistrial after a month of testimony. A two-month jury trial followed soon after and Aiello was convicted of eleven of the

charged felonies.

The Government is required to base its claims for civil forfeiture on only a limited production of evidence.

> To establish a prima facie case for forfeiture ... the Government need only demonstrate probable cause for forfeiture. To satisfy the probable cause requirement, the Government must have reasonable grounds to believe that certain property is subject to forfeiture. These grounds must rise above the level of mere suspicion but need not amount to what has been termed "prima facie proof." The Government must have probable cause to connect the property with narcotics activity, but need not link the property to a particular transaction.

United States v. Banco Cafetero Panama, 797 F. 2d 1154, 1160 (2d Cir. 1986) (citations omitted). See also 21 U.S.C. § 881 (d)(1982 and Supp. IV 1986).

In the situation presented at bar, the Government has little difficulty in meeting its probable cause burden. The very same evidence which compelled a jury

to convict the [sic] Aiello for his drug activities compels forfeiture of assets traceable to his illicit activities in these civil actions.

from the extensive evidence and testimony presented at trial, it became clear that Aiello, fronting his illicit operations in pizzerias and cafes, was not of the means independently to support his many investments without illegally gotten gains. Specifically, at trial, the Government proffered sufficient evidence that linked purchases of various real and personal property to Aiello's illicit and profitable drug enterprises. Elizabeth Aiello was also charged with and convicted of various felonies related to her husband's status as a fugitive. At the trial and sentencing, it was apparent that Elizabeth Aiello's entire working career lasted a mere nine months and all her income

and assets were attributable to the activities of Antonino Aiello.

Once the Government has established probable cause for forfeiture, the claimant bears the burden of "proving that the factual predicates for forfeiture have not been met." Banco Cafetero Panama, 797 F. 2d at 1160. The Aiellos must come forward with some evidence that cuts the link between the illicit activity and the properties subject to potential seizure.

To defeat a motion for summary judgment, the non-moving party must respond to the motion by presenting some admissible evidence of a real and material issue of fact. Celotex Corp. v. Catrett, 477 U.S. 317, 323 (1985). The Aiellos vaguely promise that they will offer such evidence at the time of trial. Merely asserting, however, that they can provide the nature and source of the funds at the tie of trial

does not raise compelling or genuine issues of fact that would defeat this motion for summary judgment.

Thus, not only does the testimony and evidence presented at the criminal trial overwhelmingly support forfeiture of Aiello's assets, but Aiello also fails to produce sufficient evidence to rebut the Government's proof linking the properties to his enormous and illegal financial gains. At best, Aiello takes exception to what he construes as "holes" in the testimony of the various government witnesses. But speculation that the Government fails to trace the proceeds to the properties with absolute certainty and beyond all possible doubt is insufficient to withstand summary judgment. In addition, matters necessarily determined by the Aiello's convictions cannot be raised by them as issues of fact here. See

Dorman v. Higgins, 821 F. 2d 133 (2d Cir. 1987).[2]

For the foregoing reasons, the Government's motion for summary judgment is granted.

SO ORDERED.

DATED: New York, New York
September 28, 1989.

/s/ Kevin Thomas Duffy
KEVIN THOMAS DUFFY USDJ

---

[2] Finally, the Aiellos proffer no facts showing that they were innocent property owners, completely unaware of the illegal activities which occurred on and in connection with the aforementioned properties See 21 U.S.C.A. § 881 (a)(6). This section provides an innocent owner exception to forfeiture which, in pertinent part, states:

> ...No property shall be forfeited under this paragraph, to the extent of the interest of an owner, by reason of any act or omission established by that owner to have been committed or omitted without the knowledge or consent of that owner.